

ASAS DUNIA

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v.

TAN CHEE SENG & ORS

HIGH COURT MALAYA, ALOR SETAR

b

HISHAMUDIN YUNUS J

[CIVIL SUIT NO: 22-32-96]

31 AUGUST 1998

CIVIL PROCEDURE: *Want of prosecution - Close of Pleadings - Delay in taking steps - Summons for direction only filed after "notice to show cause" - Parties seeking to effect amicable settlement - Whether attempts at settlement promptly made - Whether there was earnest desire to settle amicably - Whether negotiation period too long - Whether delay intentional and contumelious - Rules of the High Court 1980, O. 25 r. 1(1), O. 34 r. 8(2)*

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The plaintiff filed a writ and statement of claim against the defendants in March 1996. The 1st defendant filed his statement of defence in October 1996. Since then, neither party took any further action in respect of the matter.

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In June 1998, the Deputy Registrar of the High Court issued a notice to show cause to the parties pursuant to O. 34 r. 8(2) of the Rules of the High Court, 1980 ('the RHC'). Only after the receipt of the said notice did the plaintiff file the summons for directions in July 1998 even though according to O. 25 r. 1(1) of the RHC the summons for direction must be filed within one month after the pleadings are deemed to be closed.

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At the hearing for the show cause, learned counsel for the plaintiff submitted that the delay in proceeding with the present action was because: (i) the plaintiff was awaiting the outcome of an appeal in another case; and (ii) the parties were negotiating for an amicable settlement.

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The issue before the court was whether this action should be dismissed for want of prosecution.

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Held:

[1] There was no merit for ground (i) as the said other case was concerned with the removal of a caveat on the land by the 1st and 2nd defendants in the present suit. Legally, this was not a valid ground for not proceeding with the present suit, especially when no application for a stay of proceeding has been filed by any party.

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- a* [2] As for ground (ii), in order for a court to accept the parties' attempts to effect an amicable settlement, as an explanation for delay, there must be clear and credible evidence showing: (a) that prompt actions were taken by the parties to effect an amicable settlement; (b) that the parties were earnest, that is to say, the steps taken by them were serious and unequivocal; and (c) that the period of negotiations was not indefinite in nature or was not unreasonably long. In other words, mere efforts to effect a settlement by themselves do not afford a valid answer.

[Action dismissed.]

c **Case(s) referred to:**

United Malayan Banking Corp Bhd v. Palm and Vegetable Oils (M) Sdn Bhd [1994] 3 CLJ 144 (distd)

Toh Hock Thye & Ors v. Toh Chwee Biow [1982] 1 MLJ 152 (refd)

Legislation referred to:

- d* Rules of the High Court 1980, O. 25 r. 1(1), (4), O. 34 r. 8(2)

For the plaintiff - Foo Say Keow; M/s Murad & Foo

For the defendants - Abdul Rahim Mohd; M/s Johari Ahmad & Tan

Reported by Ling Hea Hoon

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JUDGMENT

Hishamudin Yunus J:

- f* A notice to show cause (encl. 13) was issued by the Deputy Registrar of the High Court to the parties in June 1998. It was issued pursuant to O. 34 r. 8(2) of the Rules of the High Court.

The hearing for the show cause was heard before me on 20 July 1998.

- g* After hearing both parties, I ordered that the action be dismissed for want of prosecution.

I shall now give my reasons.

The writ and statement of claim was filed on 24 March 1996 (encl. 1)

- h* The last step taken by the parties, prior to the issuance of the notice to show cause, was the filing by the first defendant of his statement of defence on 19 October 1996. Thereafter, either party took no further action. (Only after receipt of the notice to show cause did the plaintiff, on 7 July 1998, file the summons for directions *vide* encl. 15)

- i* The principle applied by this court was as laid down by the Federal Court in *Toh Hock Thye & Ors v. Toh Chwee Biow* [1982] 1 MLJ 152, is:

... we propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus – that the plaintiff's action is liable to be dismissed for want of prosecution when the Court is satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such an inordinate delay that the defendant has been prejudiced by it.

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The philosophy behind O. 34 r. 8(2) was eloquently explained by Salleh Abas FJ (as he then was) in that case (at p. 153) and needs no repetition here.

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At the end of the hearing, I was satisfied that the delay was intentional and contumelious (ie, disrespectful to the court).

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First, since October 1996, the plaintiff did not take further steps in the proceedings. This is a very long delay. According to O. 25 r. 1(1) of the Rules of the High Court, the summons for direction must be filed within one month after the pleadings are deemed to be closed. And according to O. 25 r. 1(4), if a plaintiff fails to file the summons for directions, the defendant may file for an order to dismiss the action.

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It is clear that the delay was intentional and contumelious. For, according to the learned counsel for the plaintiff, the delay was because the plaintiff was awaiting the outcome of an appeal in another case ie, Originating Motion No. 25-33-1995 – an appeal pending before the Court of Appeal, in respect of which no date of hearing has yet been fixed.

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This reasoning has no merit. It is true that the said originating motion relates to the same land as in the instant case, but it concerns an application (by the first and second defendants in the present suit) for the removal of a caveat. Hence, legally, it is not a valid ground for not proceeding with the present suit. Moreover, in any event, no application for a stay of proceeding has ever been filed by any party.

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The other reason given for the delay was that the parties were negotiating for an amicable settlement. This ground is also devoid of any merit. The brief negotiations – which, in any event, turned out to be inconclusive – took place way back in December 1996 to January 1997, but there was no evidence of any effort to effect an amicable settlement after that. Of course, I am mindful of *United Malayan Banking Corp Bhd. v. Palm and Vegetable Oils (M) Sdn Bhd* [1994] 3 CLJ 144; [1994] 3 MLJ 73. But in that case the facts were materially different. There, before the defendant filed the application to dismiss the plaintiff's claim for want of prosecution, the plaintiff had already took out a summons for directions, filed an affidavit verifying a list of documents and filed the request for setting down the action for trial. Moreover, the Supreme Court, in coming to its decision, had ruled, *inter alia*, (at p. 81)

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- a* On a whole, we are of the view that the delay in the present case was due to the **earnest desire** of both parties to reach an amicable settlement which did not succeed. (emphasis added.)

In the present case, however, although there were some efforts to settle, yet there was no earnest desire on the part of both parties to reach an amicable settlement.

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- However, be that as it may, *Palm and Vegetable Oils* has frequently been quoted by lawyers when faced with a notice to show cause. It is my observation as a judge that, with respect, litigants have quite often misunderstood the decision of that case as affording a convenient answer when faced with such a notice. With this problem in mind, I would like therefore to take the opportunity here to rule that, as a matter of principle, in order for a court to accept the parties' attempts to effect an amicable settlement, as an explanation for delay, there must be clear and credible evidence showing:

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- d* (a) that, taking into account the circumstances of each individual case, prompt actions were taken by the parties to effect an amicable settlement;
- (b) that the parties were earnest, that is to say, the steps taken by them were serious and unequivocal; and
- e* (c) that the period of negotiations was not indefinite in nature or was not, under the circumstances, unreasonably too long.

- In other words, mere efforts to effect a settlement by themselves do not afford a valid answer. The steps taken by the parties must satisfy the criteria that I have just prescribed.

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